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IN THE

Supreme Court of the United States

October Term, 1982

BERLIN L. LAWSON,
Petitioner,

v.

BURLINGTON INDUSTRIES, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether there should have been an equitable tolling of the 180 day EEOC charge filing requirement in an Age Discrimination lawsuit where the Plaintiff was paid a 6 month severance pay when he was laid off, he was told he had 270 day reinstatement rights, and, he was informed at the time he was offered another position by his Defendant employer some 90 days after his layoff that he would still be considered for other openings?

2. Whether a Plaintiff is not allowed to claim any additional acts of discrimination under the Age Discrimination in Employment Act other than those appearing on the face of an EEOC charge form?

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v.

BURLINGTON INDUSTRIES, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner Berlin L. Lawson prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 22, 1982.

OPINIONS BELOW

The opinion of the Fourth Circuit, entered on July 22, 1982, is not yet reported and is reprinted in Appendix A hereto, infra, pages App. 1 - 12.

The opinion of the United States District Court for the Middle District of North Carolina, entered on November 24, 1981, is unreported and is reprinted in Appendix B hereto, infra, pages App. 13 - 17.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 22, 1982 (Appendix A, infra, pages App. 1-12), and, this Petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 7(d) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(d), as amended by Pub. L. 95-256, § 4(a),(b)(1),(c)(1), April 6, 1978, 92 Stat. 190, 191, provides currently in pertinent part:

> (d) No civil action may be commenced by any individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [Equal Employment Opportunity Commission, administratively handling charges for the Secretary of Labor]. Such a charge shall be filed--
>
> > (1) within 180 days after the alleged unlawful practice occurred;
> > . . . .
>
> Upon receiving such a charge, the [EEOC] shall promptly notify all persons named in such charge as prospective defendants in the action. . . .

Prior to its amendment in 1978 by Congress, the relevant portion of Section 7(d) of the ADEA, 29 U.S.C. § 626(d), Pub. L. 90-202, § 7, December 15, 1967, 81 Stat. 604, provided:

> (d) No civil action may be commenced by any individual under this section until the individual has given the [Secretary of Labor] not less than sixty days' notice of an intent to file such action. Such notice shall be filed--
>
> > (1) within one hundred and eighty days after the alleged unlawful practice occurred, ...
>
> Upon receiving a notice of intent to sue, the [Secretary of Labor] shall promptly notify all persons named therein as prospective defendants in the action. . . .

STATEMENT OF THE CASE

This is a civil action brought by the Plaintiff, Berlin L. Lawson

(hereinafter Lawson), against the Defendant, Burlington Industries, Inc., (hereinafter Burlington) under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (hereinafter ADEA) in the United States District Court for the Middle District of North Carolina.

The facts are largely undisputed by the parties to the lawsuit and consisted of the pleadings and discovery materials since the District Court granted a Motion to Dismiss by the Defendant, Burlington.

Mr. Lawson worked for Burlington from ten days after leaving the U.S. Air Force in 1959 until his layoff by Burlington in 1979. On April 1, 1979, there was a group meeting of the

employees where Mr. Lawson worked, the Asheboro, N.C. Klopman Mills trucking facility (Klopman Mills is a division of Burlington). It was announced at this meeting that the Asheboro facility would be closed and:

> The employees were informed that the company would attempt to place as many people as possible at other locations. The employees were also informed that any employee who was not placed and was terminated because of the closing of this facility would have his or her benefits and company service restored if they were subsequently rehired by Burlington within 270 days of their termination. No promise was made to place all employees. It was emphasized that, while the company would attempt to find positions for these employees, the company could not guarantee that suitable positions could be located for each employee. (Burlington's Discovery Admission response; Emphasis added).

Mr. Lawson was also informed from other sources about his ability to be recalled for 270 days.

On or about June 29, 1979, Mr. Lawson had a conversation with Burlington's Division Personnel Manager Barnes at which time Mr. Lawson inquired why a Daniel Richardson was being transferred elsewhere with the company and Mr. Lawson was being laid off. Mr. Lawson was 45 at the time (date of birth, October 27, 1933) and Mr. Richardson was 38. This allegation of prima facie ADEA discrimination (discrimination against an employee over 40 in favor of an employee under 40) was alleged in the subsequent Complaint filed in District Court.

When Mr. Lawson left employment

at Burlington (his last day of work being June 30, 1979), he was given severance pay through December, 1979.

On or about October 1, 1979, Mr. Lawson was offered a clerical job at another location by Burlington. Mr. Lawson refused the job because the pay was "much, much less than what I was making", and, asked to see Personnel Manager Barnes. Barnes said:

> "I'm sorry--" but said "that's the best we can do." And he said, "Maybe we'll come up with something else." He said, "If we do, we'll be in touch". And I-we shook hands, and I left. (Deposition of Lawson, Emphasis added)

Subsequently, in January, 1980, being unsure of whether to go the Equal Employment Opportunity Commission (EEOC) or the Labor Board, Mr. Lawson made his

first attempts to file his required charges. On January 17, 1980, he filled out an Intake Questionnaire for EEOC (the governmental agency now handling ADEA cases), and, subsequently on February 5, 1980, filled out an EEOC Charge form. Burlington was subsequently served with a copy of this charge by EEOC.

Mr. Lawson was asked, in his deposition by Burlington's attorney why he had not considered filing an EEOC charge against Burlington earlier and he responded:

> A. Well, I considered it, but I always ran the--through my mind that I was going to be recalled. And I tried to check with friends of mine about openings that might come up, and I'd be sure that I--I was just certain that I would be called. And so

I did push it around in my mind, a lot of times whether to or whether not to, and, then I finally just said, well, yes, I'm going to because I have given them a lot of time, a lot of my life . . . .

Q. You were just waiting to see if the company would recall you?

A. That was the main thing because I could just not see them--after being--having the relationship with them for twenty years that I had had, and from what I had been told . . . .

. . . .

Q. You felt that left a vacancy that you should have been offered?

A. That left a vacancy, and the--I felt that was--you know, they kept talking about two hundred and seventy days, and, I'm sure I was still on the records over there somewhere, and, I knew that I would have--had had

more experience than
someone they could hire
off the street, but I
never got any call,
except for the clerical
position we just spoke of.

Mr. Lawson alleged in the EEOC charge he filed on February 5, 1980, that was written for him by an EEOC employee, that he was discriminated against by Burlington in the younger Richardson remaining an employee and Mr. Lawson being laid off on or about June 30, 1979. In the Complaint filed in U.S. District Court, in addition to allegations of discrimination because of the Richardson incident, Mr. Lawson alleged allegations of not being called within the 270 day period to openings that occurred because of his age and complaints about the Richardson discrimination, and, specifically that the

October, 1979, offer by the employer was discriminatory.

The Defendant, Burlington, moved to dismiss the Complaint because Mr. Lawson had not filed his EEOC charge within 180 days as required by Section 7(d) of the ADEA, 29 U.S.C. § 626(d), and, that the Complaint was impermissibly broad since it contained allegations not in the EEOC charge. Burlington had its Motion to Dismiss the Complaint granted by the U.S. District Court for the Middle District of North Carolina because that Court felt that equitable tolling of the 180 charge filing requirement under the ADEA was not proper under the circumstances of this case, the charge in fact had not been filed within 180 days, and, that no charge was filed alleging the

other acts of discrimination alleged in the Complaint. App. B infra. The U.S. Court of Appeals for the Fourth Circuit affirmed in its decision dated July 22, 1982. App. A infra.

REASONS FOR GRANTING THE WRIT

The Petitioner respectfully submits that (1) The decision of the Court of Appeals for the Fourth Circuit in this case as to the equitable tolling of the statute of limitations in the filing of an EEOC charge in an ADEA case is in conflict with an applicable decision by the Third Circuit; (2) The decision of the Court of Appeals for the Fourth Circuit is an important question of federal law which has not been, but should be settled by this Court because the said Court of Appeals decision

is in conflict with a Congressional mandate and the legislative history of the recent 1978 ADEA amendments wherein it was stated that the EEOC "charge requirement is not a jurisdictional prerequisite" and there is "equitable modification" available for a failure to meet the charge filing requirement; (3) The decision of the Court of Appeals for the Fourth Circuit as to limiting allegations of discrimination in a subsequent lawsuit to those specifically raised in the wording of an EEOC charge is an important question of federal law which has not been, but should be, settled by the United States Supreme Court given the importance to every individual filing any charge of discrimination and in light of prior decisions by other

courts relaxing like or related or continuing violations of employment discrimination, but, more especially, given the Congressional mandate and legislative history at least implicit to the 1978 ADEA amendments regarding a more liberalizing wording in charge filing; and, (4) The decision by the Court of Appeals regarding equitable tolling for the filing of EEOC charges and the wording of charges of employment discrimination has decided a federal question in a way in conflict with applicable decisions of this Court and other courts in similar cases, and, has, through the denial of jurisdiction to District Courts of this and similar cases, departed from the accepted and usual course of judicial proceedings

and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

1. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT AS TO EQUITABLE TOLLING OF THE EEOC CHARGE FILING TIME IN AN ADEA CASE IS IN CONFLICT WITH A DECISION OF THE THIRD CIRCUIT.

The undersigned attorney for the Petitioner cited in his brief and spent a great deal of time in arguing at oral argument before the U.S. Court of Appeals for the Fourth Circuit the similarities of the instant case of Mr. Lawson and the Third Circuit opinion of Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977) cert. denied 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978). The reasons for the citation to the

Bonham case was the striking similarity of facts in that case and Mr. Lawson's, and, the fact that Bonham had been cited by Congress when it considered the 1978 amendments to the Age Discrimination in Employment Act.

In Bonham, summary judgment was granted the defendant employer by the U.S. District Court for the Western District of Pennsylvania because the plaintiff, Mr. Bonham, had not filed his charge within the 180 day period given by the ADEA. Bonham was terminated on October 31, 1975, and, performed no services thereafter. Subsequently, on January 19, 1976, Bonham was advised by the Corporate defendant's President that there were "arrangements to review other opportunities for Bonham within the

company." 569 F.2d at 190. Thereafter, on February 18, 1976, Bonham "was notified that there would be no position for him within Dresser Industries." Id. at 190-91. On June 16, 1976, 226 days after the October 31 termination and 113 days after Dresser said no more work, Bonham filed his charge (then filing consisted of giving an "intent to sue" to an agent of the U.S. Department of Labor). The Bonham court agreed with the Tenth Circuit's decision in Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd per curiam by an equally divided court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 472 (1977), that equitable modification for filing the charge of discrimination was available and said:

> Because we construe the 180-day requirement to be in the nature of a statute of limitations, we conclude that the granting of summary judgment was improper. The affidavits before the district court on Dresser's motion state facts which give rise to a disputed issue of tolling or estoppel. Plaintiff's post-termination reaction was an attempt to secure alternative employment with the company. The letter he received in January from the company's president was optimistic in this regard. The limitations period may have been tolled while Bonham was actively pursuing his employment situation and while the company was sending positive signals. 569 F.2d at 193.

Further, the legislative history of the 1978 amendments of the ADEA specifically shows that the Bonham case was approved as an example of equitable tolling of the 180 day charge filing period:

> The conferees agree that the "charge" requirement is not

> a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. See e.g., Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976) affirmed by an evenly divided court, 98 S.Ct. 600 (1977); Bonham v. Dresser Industries, Inc. [569 F.2d 187] 16 FEP Cases 510 (3d Cir. 1977); Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977). H. Conf. Rep. No. 950, 95th Cong., reprinted in 1978 U.S. Code Cong. & Admin. News 528, 534, Legis. Hist. of 1978 Amendments to ADEA.

Lawson, in the instant case, was not only told he had 270 days as a possible reinstatement period, but, he was in fact called in after 90 days and offered another job, and, even told then that he still might be considered for other openings as they came up. Neither the U.S. District Court for the Middle Dis-

trict of North Carolina nor the Fourth Circuit Court of Appeals distinguished or even cited the Bonham case in their decisions summarily dismissing Mr. Lawson's Complaint. App. A,B, infra. This is not because the Bonham case was not relevant, but, because these Courts chose to ignore it and hold contrary to the Bonham decision without distinguishing it because that case cannot be distinguished. To be fair, the Fourth Circuit did cite a case, App. A at App. 11, Wagner v. Sperry Univac, 458 F.Supp. 505 (E.D.Pa. 1978), Aff'd mem. 624 F.2d 1092 (3d Cir. 1980), that distinguished the facts of that case from Bonham and did not give equitable tolling to a plaintiff filing an EEOC charge outside the 180 day period. However, the

Fourth Circuit cited Wagner without comment and the Third Circuit did not publish an opinion in that case. Bonham was not directly cited by the Fourth Circuit in Mr. Lawson's instant case because Bonham cannot be distinguished from the instant case before this Court. Therefore, the Petitioner, Lawson, prays this Court to note that a possible conflict between Circuits as to the law could be averted through this Court granting certiorari to the Petitioner.

2. THE DECISION OF THE FOURTH CIRCUIT AS TO EQUITABLE TOLLING OF FILING AN EEOC CHARGE IN AN ADEA CASE IS A SIGNIFICANT, IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT SHOULD BE REVIEWED BY THIS COURT.

The Petitioner was paid severance pay for six months after he was laid off

by his employer, Burlington. There is currently a conflict of opinions as to whether or not such a payment alone should extend the EEOC charge filing time in ADEA cases. E.g., Moses v. Falstaff Brewing Corp. 525 F.2d 92 (8th Cir. 1975) (180 day period extended); Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981) (limitations period not extended by separation pay). The Petitioner has contended that severance pay alone should be considered grounds for the extension of the 180 day period, but, if not just a sole factor, certainly severance pay should be considered with other equitable factors in whether to toll a statute of limitations. The true reason for seeking this Court's guidance, however, arises in reconciling cases to

the fact that some courts appear to have difficulties, even after 1978 amendments to the ADEA, in allowing equitable considerations to be considered when talking about the EEOC charge filing period. For example, in the Naton case decided in '81, a case cited by the Fourth Circuit in the instant case, App. A at App.11, that Court went to considerable discussion before deciding that equitable modification of the limitations period was possible. 649 F.2d at 695-96. While the 1978 Congressional amendments to ADEA have emphasized equitable tolling of the EEOC charge filing requirement, it appears that this legislative history is seldom, if ever, discussed by the Courts, and, therefore, this Court should intervene in this important and

significant issue. Congress stated clearly its concern as to this issue when it found "Failure to timely file [an EEOC charge] as required by section 7(d) has been the most common basis for dismissal of ADEA lawsuits by private individuals." S. Rep. 493, 95th Cong. reprinted in 1978 U.S. Code Cong. & Admin. News 504, 515, Legis. Hist. of 1978 Amendments to ADEA. Congress stated, in the Conference agreement on the changing of the wording of 7(d) to permit a "charge" to be filed rather than an "intent to sue" that "the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act",

and gave the Dartt v. Shell Oil Co. case, inter alia, as an example of equitable modification. H. Conf. Rep. No. 950, 95th Cong., reprinted in 1978 U.S. Code Cong. & Admin. News 528, 534, Legis. Hist. of 1978 Amendments to ADEA. The Dartt case was affirmed per curiam by an equally divided U.S. Supreme Court without an opinion by this Court. Dartt v. Shell Oil Co., 539 F.2d 1256, (10th Cir. 1976) affirmed by an evenly divided Court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1978). Had this Court issued a decision in Dartt (which involved delay in filing because Mrs. Dartt was not told to do so by an administrative agent investigating her case) then perhaps guidelines as to equitable tolling or estoppel would have been available in Mr. Lawson's case.

Further, had this Court granted certiorari in the Bonham case, supra, a case very similar to the instant case now before this Court, wherein the Third Circuit allowed equitable tolling of the charge filing requirement, then the Fourth Circuit may have very well ruled differently in the instant case. In any case, this Court now has before it a fairly common case (if the legislative pronouncement is to be believed concerning dismissals because of the 180 day filing requirement and given the wealth of cases on this subject). Since some confusion still exists in this area even since the recent legislative amendments to the ADEA, it is felt that this Court can and should address this substantial and important question of federal law.

3. THE DECISION OF THE FOURTH CIRCUIT AS TO ALLEGATIONS IN A COMPLAINT FILED IN A ADEA LAWSUIT BEING LIMITED TO THE WORDING OF AN EEOC CHARGE FORM IS A SIGNIFICANT, IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT SHOULD BE REVIEWED BY THIS COURT.

The Fourth Circuit's decision cites no case law for its holding that "Illegal layoff--the charge which appeared in the EEOC notice--does not encompass an allegation of illegal failure to rehire." App. A infra at App. 8. Under the pre-1978 version of Section 7(d), a potential ADEA plaintiff was required to file a "notice of intent to sue". Such a broadly worded requirement even raised an issue of whether such "notice" had to even be in writing. See, e.g., Woodford v. Kinney Shoe Corp., 369 F.Supp. 911

(N.D.Ga. 1973) (notice need not be in a writing, a telephone call was sufficient, and notice need not expressly declare the intent to file an action); Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976) (written notice filing required). Then, in the pre-1978 ADEA days, there was also a conflict as to what, if anything, the written "notice", if one was given, should require. See, e.g., Powell v. Southwestern Bell Telephone Co., 494 F.2d 485 (5th Cir. 1974) (a letter asking the Secretary of Labor to sue on behalf of an alleged ADEA discriminatee "does not equate with notice of such an individual's personal intent to commence a private lawsuit"). But, see, Franci v. Avco Corp., 460 F.Supp. 389, 392-94

(D. Conn. 1978) (stating that between Circuits and even within Districts there were disagreements on the "notice" requirement, and, holding "To require slavish compliance with the notice requirements of § 626(d) would be to create a procedural pitfall which not only would frustrate the remedial objectives of ADEA, but also would do little to bolster the layman's respect for the law and the legal profession"). To state that the issue of jurisdictional filing within 180 days created a wealth of case law, much of it inconsistent, among the various federal courts, is to make an understatement. See generally, Annot., Construction and Application of Age Discrimination in Employment Act, 24 ALR Fed. 808, 827-832 at § 3(a)

(Supp. 1981). The clear intention of Congress in the legislative history of the 1978 amendments to the ADEA that the new "charge" requirement in replacing the "notice of intent to sue" was to liberalize and make easier the 180 day filing requirement by potential ADEA litigants. Scaramuzzo v. Glenmore Distilleries Co., 501 F.Supp. 727, 730-31 (N.D. Ill. 1980). Congress implicitly understood the function of an EEOC charge when it stated that: "This change in language [from 'notice of intent to sue' to filing a 'charge'] is not intended to alter the basic purpose of the notice requirement, which is to provide the [Department of Labor; now the EEOC] with sufficient information so that it may notify prospective defendants and to

provide the [Secretary of Labor, now the EEOC] with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation." 1978 U.S. Code Cong. & Admin. News at 534, supra. The Defendant, Burlington, was notified by the EEOC of Mr. Lawson's charge filing in this case, but, perhaps the real difficulty comes from the fact that if the Fourth Circuit's decision stands in this case, it is not just "notice" that will be required but intimate knowledge of each and every possible allegation that a potential plaintiff, such as Mr. Lawson, must allege in his ADEA Complaint. The importance of this issue reaches beyond just the instant case, and, therefore, the Petitioner respectfully requests

that certiorari be granted to decide this important and recurring problem.

4. THE DECISION OF THE FOURTH CIRCUIT HAS DECIDED AN ISSUE IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, AND, THROUGH THE DENIAL OF JURISDICTION IN THIS AND SIMILAR CASES, HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

To say that this particular case may impact harshly upon one individual Plaintiff, Mr. Lawson, would not say much towards why this Court should grant certiorari in this case. However, Congress has noted that the 180 day charge (or its predecessor "notice of intent to sue") requirement was "the most common basis for dismissal of

ADEA lawsuits." 1978 U.S. Code Cong. & Admin. News at 515, supra. The importance of a ruling by this Court should be self-evident as to what standards should be uniformly applied throughout the Federal Court System in whether or not ADEA lawsuits are to be allowed in the first place (whether the 180 day EEOC charge filing jurisdictional requirement has been fulfilled). Hence, perhaps the threshold jurisdictional question and the need for uniformity throughout the Federal System has been the reason why this Court has granted certiorari in other employment cases recently involving other employment laws such as Title VII, 42 U.S.C. §§ 2000e et seq., and 42 U.S.C. § 1983. Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66

L.Ed.2d 431 (1980); Chardon v. Fernandez, __U.S. ___, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981). More recently, in a case cited by the Fourth Circuit in its opinion in the instant case, App. A at App. 9, infra, this Court decided Zipes v. Trans World Airlines, Inc., ___U.S. ___, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), which held that filing a timely charge of discrimination in a Title VII case with the EEOC is not a jurisdictional prerequisite to suit in federal court but is subject to waiver, estoppel, and equitable tolling. This Court, in Zipes, at footnote 11, noted the similarities between employment cases under the National Labor Relations Act (NLRA), as amended, 29 U.S.C. §§ 151 et seq., and, especially noted the

"equitable modification" available to Plaintiffs under the 1978 Amendments to the ADEA. The importance of the instant case, just for the other issue in this case, the contents of the EEOC Charge form itself, and using an NLRA case as an example as in Zipes, is that the question of a variance from language in a charge form is but a procedural ploy to oust a Federal Court of jurisdiction and not to address the merits, is to ignore the function of such charges to just attempt an administrative resolution of matters before more formal and complete litigation over all matters in controversy is taken (given the liberal "notice" and amendment processes under the Federal Rules such a purpose of an administrative agency's charge form is

entirely consistent with prior precedent):

> A charge is a condition precedent to the [NLRB's] power to issue a complaint. Nat. Licorice Company v. NLRB, 309 U.S. 350, 368, 60 S.Ct. 569, 84 L.Ed. 799. However, "The charge is not proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading." NLRB v. Indiana & M.Elec. Co., 318 U.S. 9, 18, 63 S.Ct. 394, 400, 87 L.Ed. 579. As said by Judge Sibley speaking for this court in National Labor Relations Board v. Tex-O-Kan Flour Mills, 5 Cir. 122 F.2d 433, 437, "The charges are addressed to the Board and are not cases at all. The case between the Board and the employer begins with the complaint prepared by the Board." NLRB v. Westex Boot & Shoe Co., 190 F.2d 12, 13 (5th Cir. 1951).

The instant case from the Fourth Circuit is much broader than just whether

Mr. Lawson gets his day in Court or not, but, perhaps will affect whether the Fourth Circuit opinion will limit future Plaintiff's rights in ADEA and even other kinds of employment cases to appear in cases where there is a question as to whether an administrative charge was timely filed or the language of the administrative charge was written in explicit enough language. Given this Court's and other court rulings (not to speak of the Legislative History of the ADEA) that may be affected by the ruling of the Fourth Circuit in the instant case, which could be used to oust countless cases from Federal Courts on jurisdictional grounds in the future, the Petitioner respectfully submits that this Court should grant certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

JACK E. RUBY
409 Pepper Building
Winston-Salem, N.C. 27101
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

for the Fourth Circuit

No. 81-2192

Berlin L. Lawson,

Appellant,

v.

Burlington Industries, Inc.,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge.

Argued: April 1, 1982

Decided: July 22, 1982

Before BUTZNER and SPROUSE, Circuit Judges, and KISER,* District Judge.

Jack E. Ruby for Appellant; William P. H. Cary (Thornton H. Brooks, Kathrine A. McLendon, Brooks, Pierce, McLendon, Humphrey and Leonard on brief) for Appellee.

SPROUSE, Circuit Judge:

Berlin L. Lawson brought this suit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq., alleging that Burlington Industries, Inc. unlawfully terminated his

---

*Honorable Jackson L. Kiser, United States District Judge for the Western District of Virginia, sitting by designation.

employment and refused to transfer him to an acceptable position because of his age. The district court granted summary judgment for the defendant on the grounds that Lawson failed to file his discrimination charge within the statutory time period,[1] and that no equitable justifications for tolling the statutory period existed. We affirm.

---

[1] 29 U.S.C. § 626(d)(1) provides:

> (d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [Equal Employment Opportunity Commission]. Such a charge shall be filed--
>
> (1) within 180 days after the alleged unlawful practice occurred. . . .

Lawson was first hired by Burlington in 1959, and in 1979 he was working at the transportation facility of Klopman Mills, a division of Burlington. On April 1, 1979, all employees were informed that the facility was closing, that Burlington would attempt to find new positions for employees displaced by the closing, and that those employees not placed by June 30, 1979 would be terminated. Employees terminated because of the facility closing would have their benefits and company service credit restored if they were rehired within 270 days of their termination. Lawson's final day of work was June 30, 1979, although he was given severance pay through December, 1979.

Shortly before his termination Lawson, then age 44, complained to

Burlington officials that a younger co-worker, age 38, was being transferred to an available position elsewhere in the company while he was being laid off. Lawson had more service with the company and believed he was better qualified, so he concluded that age discrimination was the motive behind the decision to transfer the younger worker rather than himself.

Lawson closed his retirement and profit-sharing accounts with Burlington when he was terminated; he received a lump-sum distribution of cash and stock, plus his severance pay, on July 19, 1979. Burlington offered Lawson a clerical job in another city on or about October 1, 1979, but he refused the position because of the inadequate salary. He was then told by a company official that "maybe

We'll come up with something else...if we do, we'll be in touch."

Lawson filed his age discrimination charge with the EEOC on February 5, 1980. He testified that he had considered filing the charge earlier, but had refrained because he hoped to be recalled. The EEOC charge dealt only with Burlington's decision to lay off Lawson while tranferring the younger employee. Lawson filed suit in district court in June, 1980, claiming that age discrimination was the motive behind both the layoff and the October offer of a clerical position, which Lawson construed as a refusal to rehire him.

Burlington moved to dismiss the complaint for lack of subject matter jurisdiction, Fed.R.Civ.P. 12(b)(1), or alternatively for summary judgment, Fed.

R.Civ.P. 56, on the grounds that (1) Lawson had not filed his EEOC charge within 180 days after the alleged unlawful practice occurred and (2) his complaint was impermissibly broad as it raised issues not included in the EEOC charge. Following oral argument by both parties the district court granted summary judgment for the defendants, ruling that "[w]ith respect to the layoff on June 30, 1979, his charge of discrimination was filed more than 180 days after such layoff, and with respect to the other acts of discrimination alleged in the complaint, no charge of discrimination had been filed, and more than 180 days have now expired. Plaintiff has not presented a justification for this failure, which is sufficient to entitle him to equitable relief. . . ."

Lawson first contends that the district court erred in dismissing from his complaint those allegations which were not included in his February 5, 1980 EEOC charge. We disagree. Illegal layoff--the charge which appeared in the EEOC notice--does not encompass an allegation of illegal failure to rehire. It is well established that a layoff from employment constitutes a completed act at the time it occurred, Griffin v. Pacific Maritime Assoc., 478 F.2d 1118 (9th Cir.) cert. denied, 414 U.S. 859 (1973), and that an employer's failure to recall or rehire does not constitute a continuing violation of the ADEA. Each alleged discriminatory recall constitutes a separate and completed act by the defendant, which triggers a new 180 day period. Morris v. Frank Ix & Sons, Inc.,

486 F. Supp. 728 (W.D.Va. 1980). As no EEOC charge relating to recall was filed within 180 days of October 1, 1979, the district court's determination that Lawson failed to file within the statutory time period was correct.

Lawson next contends that the grant of summary judgment was improper because there exists a genuine issue of fact with respect to whether equitable tolling of the 180-day requirement occurred.[2] Lawson had an opportunity at the hearing on Burlington's motion for summary judgment to present those facts which

---

[2] Cf. Zipes v. Transworld Airlines, 50 U.S.L.W. 4239 (Feb. 24, 1982) (180-day time limit for filing charges under Title VII of the Civil Rights Act of 1964 is not a jurisdictional prerequisite to suit in a district court).

he asserts should equitably toll the 180-day requirement. After hearing the evidence, the district court determined that no genuine issue of fact with respect to equitable tolling existed and that Burlington was entitled to judgment as a matter of law. We agree. Lawson maintains that equitable tolling is justified because his filing of EEOC charges was delayed by his expectation that he would be recalled to work. That expectation arose from three factors: (1) his 6-month severance pay from Burlington, (2) his right to full reinstatement within 270 days of layoff and (3) the offer of a position to him in October, 1979, and Burlington's representation that he would be considered for future positions.

The thrust of Lawson's contention is that the filing period should be equitably tolled because he believed Burlington would eventually find a position for him. However, the facts are uncontroverted that Burlington in no way misled Lawson or misrepresented his prospects for future employment. Lawson's optimistic hope that he would be recalled within the 270-day period falls short of demonstrating the "reasonable reliance on the defendant's conduct or representations" necessary to justify equitable tolling in this situation. See Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981); Wagner v. Sperry Univac, 458 F. Supp. 505 (E.D.Pa. 1978), aff'd mem. 624 F.2d 1092 (3d Cir. 1980).

The grant of summary judgment for the defendant by the district court is, therefore, affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

BERLIN L. LAWSON, Plaintiff	:	
v.	:	C-80-274-G
BURLINGTON INDUSTRIES, Inc., Defendant,	:	

MEMORANDUM

This matter came on to be heard on August 31, 1981 on the defendant's motion to dismiss or, in the alternative, for summary judgment. Based on the pleadings, submissions, and oral arguments of both parties, the Court concludes that the plaintiff has failed to satisfy the requirement of 29 U.S.C. § 626(d) providing that a charge of discrimination must be

filed within 180 days after the alleged unlawful practice occurred. With respect to the layoff on June 30, 1979, his charge of discrimination was filed more than 180 days after such layoff, and with respect to the other acts of discrimination alleged in the complaint, no charge of discrimination has been filed, and more than 180 days have now expired. Plaintiff has not presented a justification for this failure, which is sufficient to entitle him to equitable relief from the foregoing statutory requirement.

It is hereby ORDERED that defendant's motion to dismiss or, in the alternative, for summary judgment is granted. Each party shall bear its own costs.

This the 24th day of November, 1981.

/s/ Richard C. Erwin

United States District Judge

A True Copy

Teste:

Carmen J. Stuart, Clerk

By: /s/ Sandra W. Loye

Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

BERLIN L. LAWSON, Plaintiff,	:	
v.	:	C-80-274-G
BURLINGTON INDUSTRIES, INC., Defendant,	:	

ORDER

It is hereby ORDERED that for the reasons enumerated in the accompanying memorandum, the defendant's motion to dismiss or, in the alternative, for summary judgment is granted.

This the 24th day of November, 1981.

/s/ Richard E. Erwin

United States District Judge

A True Copy

Teste:

Carmen J. Stuart, Clerk

By: /s/ Sandra W. Loye

Deputy Clerk

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-325

BERLIN L. LAWSON,

Petitioner,

v.

BURLINGTON INDUSTRIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

No. 82-325

BERLIN L. LAWSON,

Petitioner

v.

BURLINGTON INDUSTRIES, INC.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Burlington Industries, Inc. respectfully opposes the Petition for a Writ of Certiorari seeking to review the decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on July 22, 1982.

STATEMENT OF THE CASE *1

For a concise statement of the case, Respondent refers the Court to the summary of facts and proceedings below contained in the opinion of the Fourth Circuit Court of Appeals in this action, reprinted in the Appendix to the Petition, A. 2-7. The following additional facts are material to the Court's consideration: Petitioner complained to officials of the Respondent about Petitioner's layoff and the alleged discriminatory transfer of Daniel Richardson at the time of (or shortly before) the layoff, specifically alleging age discrimination.

---

*1 For Questions Presented, List of Parties, Opinions Below, Jurisdictional Grounds, and Statutory Provisions Involved, see PETITION.

Respondent offered Petitioner its explanation of the selection of Daniel Richardson for transfer, and more than 180 days elapsed before Petitioner filed his charge of discrimination with the Equal Employment Opportunity Commission. Petitioner, a former supervisor, was aware of the existence of a law prohibiting discrimination on the basis of age. A copy of the charge of discrimination in this case is attached to this Brief as Appendix page 1.

ARGUMENT

I. THE COURT OF APPEALS' DETERMINATION THAT PETITIONER HAS NOT MADE A SHOWING OF EQUITABLE CONSIDERATIONS SUFFICIENT TO TOLL THE STATUTE'S FILING REQUIREMENT IS IN ACCORDANCE WITH THE GENERAL PRINCIPLES OF EQUITY ENUNCIATED BY THIS COURT, IS NOT IN CONFLICT WITH ANY RULING OF ANY OTHER CIRCUIT COURT OF

APPEALS, AND DOES NOT PRESENT AN IMPORTANT OR UNSETTLED QUESTION OF FEDERAL LAW.

It should be noted at the outset that the Court of Appeals' decision in this case was made with the benefit of the guidance presented by Zipes v. Trans World Airlines, Inc., 50 U.S.L.W. 4238 (February 24, 1982)*2. Thus, the Court did not treat Petitioner's failure to file his charge of discrimination within 180 days of the layoff complained

---

*2 In many areas, including the administrative prerequisites to litigation, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., (hereinafter "Title VII") is instructive in cases arising under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (hereinafter "ADEA"), and vice versa. Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979); Zipes v. Trans World Airlines, Inc., supra at 4240, n. 11; Smith v. Flax 618 F.2d 1062 (4th Cir. 1980).

of as a jurisdictional defect absolutely barring this action but, rather, examined the equitable considerations propounded by Petitioner in favor of "tolling" the statute's filing requirement and found them lacking.

Petitioner's primary argument appears to be that the Court of Appeals' decision in this case presumably conflicts with a ruling of the Third Circuit Court of Appeals rendered in Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978). A close comparison of the two cases does not bear out this conclusion. First, the differences in the nature, quality and context of the respective defendant companies' representations of employment possibilities are solely

factual and therefore not an appropriate issue for review via writ of certiorari.

> "Nor will differences between two circuits likely be accepted as a sufficient conflict 'if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved.'" 13 Moore's Federal Practice ¶817.21, p. SC17-22 at n. 11, citing Harlan, "Manning The Dikes" (1958), 13 Record NYCBA 541, 552 at n. 9.

Moreover, a significant distinction is that Mr. Bonham, unlike Petitioner here, raised by affidavit the additional factual issue that, through the defendant company's own wrong-doing (i.e., failure to post the required notices informing employees of the statutory protections of the ADEA), he was unaware of his rights under the ADEA at the very time he was

being "lulled" into inactivity. Petitioner here has not raised a similar argument, nor could he: as a former supervisor, he testified at his deposition that he was aware of a law prohibiting age discrimination and complained of age discrimination to company officials at the time he was laid off. The same distinctions were drawn in Wagner v. Sperry Univac, 458 F.Supp. 505 (E.D. Pa. 1978), aff'd mem. 624 F.2d 1092 (3d Cir. 1980), which case was cited by the Court of Appeals in this case, thus indicating that the court was not, as supposed by Petitioner, unmindful of the Bonham decision but rather distinguished it on the grounds suggested by Wagner.

The other factors cited by Petitioner for equitable consideration [payment of severance pay and existence of recall rights] have been widely rejected by other courts. See, e.g., Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981); Payne v. Crane Co., 560 F.2d 198 (5th Cir. 1977); Davis v. RJR Foods, Inc., 420 F.Supp. 930 (S.D.N.Y. 1976), aff'd mem. 556 F.2d 555 (2d Cir. 1977); Wilkerson v. Siegfried Insurance Agency, Inc., 621 F.2d 1042 (10th Cir. 1980). The same result has been reached in Title VII cases. Doski v. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Krzyzewski v. Metropolitan Government, 584 F.2d 802 (6th Cir. 1978); Greene v. Carter Carborator Co., 532 F.2d 125

(8th Cir. 1976); Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (en banc.). Moreover, it is interesting to note that in Delaware State College v. Ricks, 449 U.S. 250 (1980), Justice Stevens (arguing in dissent for a more liberal construction of the filing requirement in Title VII cases) specifically rejected the suggestion that severance benefits might further extend the statute of limitations; this, he reasoned, would present too indefinite a rule. 449 U.S. at 265, n.1.

As noted on page 5 of the Petition, the facts in this case are "largely undisputed." Four federal judges have now considered these facts and have unanimously agreed on their

significance: they do not constitute an adequate basis for invoking equitable tolling. This factal evaluation does not present an important federal question for this Court to decide. See, e.g., Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924). The standards utilized by both courts are in accordance with the standards applied in other similar cases. Wilkerson v. Siegfried Insurance Agency, Inc., 683 F.2d 344 (10th Cir. 1982); Reeb v. Economic Opportunity Atlanta, Inc. 516 F.2d 924 (5th Cir. 1975); CitiCorp Person-to-Person Fin. Corp. v. Brazell, 658 F.2d 232 (4th Cir. 1981); Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982). Moreover, equitable considerations and the standards to

be applied when tolling of a statute of limitations is sought are not novel questions. [see, e.g., Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976)] and there is no indication that either court in this case has deviated from these traditional standards.

Even if the lower courts have incorrectly determined the tolling issue, the basis of the district court's decision is factual and resolution of the alleged error by this Court would have no significance beyond this case. Therefore, review by writ of certiorari is not warranted on this issue. Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923).

II. THE COURT OF APPEALS' CONCLUSION THAT PETITIONER'S EEOC CHARGE ALLEGING DISCRIMINATORY LAYOFF

WAS NOT SUFFICIENTLY BROAD TO SUPPORT A SUBSEQUENT ACTION FOR ALLEGED DISCRIMINATORY FAILURE TO REHIRE IS IN ACCORDANCE WITH THE GENERAL PRINCIPLES ENUNCIATED BY THIS COURT AND DOES NOT PRESENT AN IMPORTANT OR UNSETTLED QUESTION OF FEDERAL LAW.

While this Court has never specifically addressed the narrow issue decided by the lower courts in this action, the guidance offered by the expressed legislative intent as well as general principles developed in cases arising under the ADEA and Title VII indicate that the conclusion reached by the Fourth Circuit Court of Appeals does not constitute a substantial deviation from established federal principles.

It is abundantly clear that a major congressional priority in the scheme of civil rights legislation is

the prominant role of voluntary compliance, achieved through mandatory deferral to administrative procedures now consolidated under the jurisdiction of the EEOC. Oscar Mayer & Co. v. Evans, supra [ADEA]; Love v. The Pullman Co., 404 U.S. 522 (1972) [Title VII]. If a plaintiff can circumvent these procedures and still gain access to the federal courts, the legislative intent will have been frustrated.

The lower courts' decisions, contrary to Petitioner's implications, do not advocate a hypertechnical or unreasonably narrow reading of every charge. The standard (at least in the Fourth Circuit) has long been that a litigant can raise any issue of discrimination stated in the charge itself or developed in the course of a

reasonable investigation of that charge. King v. Seaboard Coastline R.R. Co., 538 F.2d 581, 583 (4th Cir. 1976); EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976). This test is consistent with the expressed legislative intent of the 1978 amendments to the ADEA which deleted the "notice of intent to sue" requirement and substituted therefor the current "charge" requirement:

> "Therefore, the conferees intend that the 'charge' requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory." H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 12 (1978), reprinted in [1978] 3 U.S. Code Cong. & Ad. News, 528, 534 (emphasis added).

In the present case, the District Court and the Court of Appeals concluded that

the complaint's allegations regarding discriminatory failure to re-hire would not, if proved, constitute a continuing violation and were not otherwise embraced by the charge of discriminatory layoff (attached hereto at A.1).[*3] This interpretation of the scope of discrimination alleged in Petitioner's charge does not present an important or unsettled issue of federal law. Accordingly, review by writ of certiorari is not warranted on this issue.

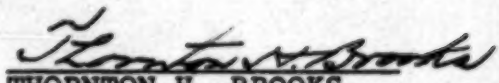
[*3] Many other courts have similarly concluded that layoff and rehiring are distinct issues. See Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977); Woodburn v. LTV Aerospace Corp., 531 F.2d 750 (5th Cir. 1976); Morris v. Frank IX & Sons, Inc., 486 F.Supp. 728 (W.D. Va. 1980); Cutright v. General Motors Corp., 486 F.Supp. 590 (W.D. Pa. 1980); Mazzare v. Burroughs Corp., 473 F.Supp. 234 (N.D. Pa. 1979).

CONCLUSION

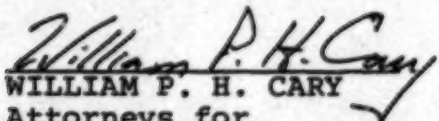
Petitioner has completely failed to establish the "special and important reasons" for the granting of a writ of certiorari, as required by Rule 17 of the Rules of the Supreme Court. The standards applied by the Court of Appeals in this case are in accordance with the general rules developed by this Court and the courts of the various circuits in discrimination cases and do not present important questions of federal law in need of resolution by this Court. The petition for a writ of

certiorari should therefore be denied.

Respectfully submitted,



THORNTON H. BROOKS



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DATED: September 1982

APPENDIX 1

(PLEASE PRINT OR TYPE)

CHARGE OF DISCRIMINATION

EEOC 017801029

Equal Employment Opportunity Commission

Mr. Bebel Lawson — 672 1425

Rt. 2 Box 325 — Randall

Lincolnton North Carolina 28092

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below).

Burlington Industries

Asheboro North Carolina 27203

RECEIVED
EEOC GREENSBORO AREA OFFICE
GREENSBORO, N. C.
DATE: 6 02 0810

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN

Age Discr

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year)

June 30 1979

THE PARTICULARS ARE:

I. I was laid off for reorganization purposes on June 30, 1979. I have worked for the company for 20 yrs and have outfalled Overall several other employees. The company employs more than 20 persons.

II Robert Jenkins Personnel Manager told me that due to the reorganization of the company I would have to be laid off because there were to many and. He also stated that as soon something became available I would be rehired

III That I have been discriminated against because of my age because

A) Daniel Richardson 36 received the position of Curtis Fleming

B) I had more experience and a better work record on my opinion than Daniel did.

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I declare under penalty of perjury that the foregoing is true and correct.

2/1/82 — Bebel Lawson

SIGNATURE OF COMPLAINANT